7

06-11612

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

HOMERO GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

BRENT E. NEWTON
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana, Suite 310
Houston, Texas 77002-1634
Telephone: (713) 718-4600

QUESTION PRESENTED

Petitioner, a Mexican citizen who does not speak English, was represented by counsel at his federal drug-trafficking trial. After appearing before a United States district judge at several pretrial conferences, petitioner was brought before a United States magistrate judge for jury selection. At a bench conference outside of petitioner's presence and before petitioner had the assistance of an interpreter, defense counsel orally consented to the magistrate judge's presiding over the jury selection process. Thereafter, the magistrate judge did not obtain petitioner's consent or even mention that his attorney had consented outside of his presence. Based on the foregoing, the question presented is as follows:

> Is a federal criminal defendant's counsel's oral consent to have a United States magistrate judge preside over jury selection binding on the defendant when the record does not reflect the defendant's own knowing and voluntary waiver of his constitutional right to have an Article III judge preside over jury selection?

Several United States Courts of Appeals have addressed this issue and have issued conflicting decisions.

PARTIES TO THE PROCEEDING

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

PRAYER 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

BASIS OF FEDERAL JURISDICTION 4

REASONS FOR GRANTING THE WRIT 12

This Court should grant certiorari and resolve the division among several circuit courts concerning whether a federal criminal defendant must personally consent to a United States magistrate judge's presiding over jury selection or whether consent from the defendant's counsel by itself is sufficient to satisfy Article III's requirements. 12

Conclusion 20

APPENDIX A: Opinion of the Court of Appeals in United States v. Gonzalez, 483 F.3d 390, (5th Cir. 2007) 21

APPENDIX B: Judgment of the district court in United States v. Gonzalez, No. 5:04CR1763-S-001 (S.D. Tex. May 2, 2005) 26

APPENDIX C: Excerpt from jury selection transcript 33

TABLE OF CITATIONS

Page

CASES

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed. 2d 274 (1969) 18

Brookhart v. Janis, 384 U.S. 1 (1966) 17

Commodities Future Trading Comm'n v. Schor, 478 U.S. 833 (1986) 17-18

Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed. 2d 491 (1968) 18

Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 8 L.Ed. 2d 671 (1962) 10

Gomez v. United States, 490 U.S. 858 (1989) 12, 14, 16-17

Government of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir.1989) 16

Grosso v. United States, 390 U.S. 62, 88 S. Ct. 709, 19 L.Ed. 2d 906 (1968) 10

Harris v. Folk Construction Company, 138 F.3d 365 (8th Cir. 1998) 13, 19

Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719, 85 L.Ed. 1037 (1941) 10

Johnson v. Zerbst, 304 U.S. 458 (1938) 14, 17

NLRB v. A-Plus Roofing, 39 F.3d 1410 (9th Cir. 1994), reh'g en banc on other grounds, 133 F.3d 704 (9th Cir. 1998), vacated on other grounds, 525 U.S. 801 (1998), on remand, 165 F.3d 689 (9th Cir. 1999) 15

New York v. Hill, 528 U.S. 110 (2000) 17

Norris v. Schotten, 146 F.3d 314 (6th Cir. 1998) 14

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 18

TABLE OF CITATIONS - (Cont'd)

Page

CASES - (Cont'd)

Patton v. United States, 281 U.S. 276 (1930), overruled on other grounds, Williams v. Florida, 399 U.S. 78 (1970) 17

Peretz v. United States, 501 U.S. 923 (1991) 9, 11-18

United States v. Desir, 273 F.3d 39 (1st Cir. 2001) 13

United States v. Dobey, 751 F.2d 1140 (10th Cir. 1985) 14

United States v. Foster, 57 F.3d 727 (9th Cir. 1995) 15

United States v. Frechette, 456 U.S. 1 (1st Cir. 2006) 18

United States v. Gamba, ___ F.3d ___, 2007 WL 1063147 (9th Cir. Apr. 11, 2007) reh'g en banc denied, No. 06-35021 (9th Cir. May 22, 2007) 14-15, 17, 19

United States v. Gomez-Lepe, 207 F.3d 623 (9th Cir. 2000) 15

United States v. Gonzalez, 483 F.3d 390 (5th Cir. 2007) . . . . . iii, 1, 7-8, 11, 13-14, 18

United States v. Jones, 938 F.2d 737 (7th Cir. 1991) 9, 13

United States v. Maragh, 174 F.3d 1202 (11th Cir. 1999), supplemental op. on reh'g 189 F.3d 1315 (11th Cir. 1999) . . . . . 6, 1[illegible]6

United States v. Maragh, 189 F.3d 1315 (11th Cir. 1999) 9

United States v. Muhammad, 165 F.3d 327 (5th Cir. 1999) 14

United States v. Rivera-Sola, 713 F.2d 866 (1st Cir. 1983) 9

Page

CASES - (Cont'd)

United States v. Woodard, 387 F.3d 1329 (11th Cir. 2004) 13

United States v. Young, 470 U.S. 1, 15, and n. 12, 105 S.Ct. 1038, and n. 12, 84 L.Ed. 2d 1 (1985) 10

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed. 2d 700 (1982) 10

Webster v. Doe, 486 U.S. 592, 108 S. Ct. 2047, 100 L.Ed. 2d 632 (1988) 10

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III, sec. 1 . . . i, iii, 2, 6-8, 12-15, 17-18

STATUTES AND RULES

18 U.S.C. § 3401(b) 10

28 U.S.C. § 636 12

28 U.S.C. § 636(b)(3) 2, 12-13, 16, 18

28 U.S.C. § 636(c) 14

28 U.S.C. § 1254(1) 1

Fed. R. Crim. P. 51 9

Fed. R. Crim. P. 52(b) 8, 10

Sup. Ct. R. 13.1 1

PRAYER

Petitioner, Homero Gonzalez, prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Fifth Circuit in his case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case, which is reported at United States v. Gonzalez, 483 F.3d 390 (5th Cir. 2007), is attached to this petition as Appendix A. The judgment of the district court is attached as Appendix B. The district court did not issue any written opinion or order related to the issue raised in this petition.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on March 30, 2007. No petition for rehearing was filed. This petition is filed within ninety days after entry of judgment by the Court of Appeals. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented implicates Article III, section 1, and 28 U.S.C. § 636(b)(3), which provide that:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. Art. III, sec. 1; and

> A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

28 U.S.C. § 636(b)(3).

STATEMENT OF THE CASE[1]

A. Proceedings Below

On December 7, 2004, a federal grand jury in Laredo, Texas, returned a multi-count superseding indictment charging the petitioner, Homero Gonzalez, and a co-defendant, Patrick Leyendecker, with both conspiracy and substantive drug offenses involving large quantities of marijuana. R. 32. Mr. Gonzalez pleaded not guilty and the case proceeded to a jury trial on January 24, 2005. R. 59. On January 26, 2005, the jury returned a verdict of guilty on all counts. R. 76.

On April 27, 2005, the district court sentenced Mr. Gonzalez to serve 190 months in the custody of the Federal Bureau of Prisons to be followed by a five-year period of supervised release. R. 89. The court waived a fine but imposed a $500 special assessment. Id. On May 3, 2005, Mr. Gonzalez filed a timely notice of appeal. R. 99.

On March 30, 2007, the United States Court of Appeals for the Fifth Circuit affirmed Mr. Gonzalez's conviction. Appendix A. No petition for rehearing was filed.

---

[1] The record on appeal ("R.") is cited by the pagination appearing in the electronic record used by the Court of Appeals. The presentence report ("PSR") is cited by paragraph number.

B. Statement of the Facts

The facts of the offenses[2] are not relevant to sole legal issue raised on appeal. The only relevant facts concern the pretrial procedural events related to jury selection.

At the time of trial, Homero Gonzalez was a 45-year old Mexican citizen. See PSR ¶ 58. The record reflects that Mr. Gonzalez did not speak English and required the assistance of an official court interpreter (who interpreted the English proceedings into Spanish). R. 152. After Mr. Gonzalez was indicted, there were four pretrial conferences in this case, which occurred (in sequential order) on November 19, 2004; December 14, 2004; December 17, 2004; and January 18, 2005. See R. 276-84 (Pretrial Conference Transcript, November 19, 2004); R. 272-73 (Pretrial Conference Transcript, December 14, 2004); R. 227-33 (Pretrial Conference Transcript, December 17, 2004); R. 235-40 (Pretrial Conference Transcript, January 18, 2005). United States District Judge George P. Kazen presided over each of the four pretrial conferences.

At no point during any of the pretrial conferences did Mr. Gonzalez consent to have a United States magistrate judge preside over jury selection in his case. See id. The only mention of jury selection came at the very end of the last pretrial conference, when Judge Kazen stated that "we're picking a jury" the following Friday or Monday but made no reference to a magistrate judge assisting in jury selection. R. 240.

---

[2] See PSR ¶¶ 8-35 (discussing the prosecution's evidence of the offenses).

At the outset of the jury selection process, which occurred on Friday, January 21, 2005, United States Magistrate Judge Adriana Arce-Flores asked "the attorneys [to] approach the bench." R. 151. She then stated the following: "I need to ask the parties at this time if they are going to consent to having th[is] United States Magistrate Judge proceed in assisting in the jury selection of this case." Id. The prosecutor first responded, "Yes, we are, your Honor." Id. Mr. Gonzalez's attorney, Oscar Pena, Sr., then responded: "Yes, your Honor, we are." Id. Magistrate Judge Arce-Flores then stated, "The parties have agreed through consent that this Court will be assisting through the process of jury selection." Id. at 151-52. Magistrate Judge Arce-Flores then asked defense counsel "[i]s the defendant present," to which defense counsel responded, "[h]e is present, your Honor." R. 152. Magistrate Judge Arce-Flores next asked defense counsel whether Mr. Gonzalez "need[s] the assistance of a[] [Spanish] interpreter," to which defense counsel responded, "[y]es he does, your Honor." Id. At no point did the magistrate judge ask *Mr. Gonzalez* whether he had consented to the magistrate judge's presiding over jury selection or even mention the fact that his attorney had consented. (The relevant excerpt from the voir dire proceedings is attached as Appendix C.) Only defense counsel was asked to consent when he and the prosecutor approached the bench - outside of Mr. Gonzalez's presence and before he had the services of a Spanish interpreter. The record also does not contain any type of written consent executed by Mr. Gonzalez.

The jury trial commenced on the morning of Monday, January 24, 2005, before a visiting district judge, the Honorable Adrian Duplantier. See R. 59. On January 26, 2005, the jury convicted Mr. Gonzalez. R. 76.

For the first time on appeal, Mr. Gonzalez (represented by new counsel) contended that the magistrate judge's presiding over jury selection was improper because the record did not reflect Mr. Gonzalez's knowing and voluntary consent to such. See C.A. Brief of Appellant, at 6-11. The Fifth Circuit rejected this claim and held that the fact that defense counsel had consented to the magistrate judge's presiding over jury selection was legally sufficient even though the record did not reflect Mr. Gonzalez's own personal, knowing consent:

> Gonzalez relies heavily on the Eleventh Circuit decision in United States v. Maragh, 174 F.3d 1202 (11th Cir.1999), which presented a factual scenario similar to this case. . . . The Eleventh Circuit appears to be alone in having reached the conclusion that the defendant's personal consent is required for the delegation of jury selection to be constitutionally valid. Given the unsettled state of the law, . . . it is difficult to see how Gonzalez could demonstrate that the delegation of jury selection [without his personal consent] constituted a plain error. Even if, however, we were to review under a less stringent standard, [Gonzalez is not entitled to relief]. No court other than the Maragh panel of the Eleventh Circuit has reached the outcome Gonzalez proposes, and the debate among the other circuits appears to turn on whether affirmative consent is required at all, not on what form this consent must take.
>
> Although certain rights are so fundamental that they must be waived personally by the defendant, Gonzalez provides no support for his contention that the right to have an Article III judge conduct voir dire is among them. What suffices for waiver depends on the nature of the right at issue. [W]hether the defendant must participate personally in the waiver; whether certain

> procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. [Citations and internal quotation marks omitted.] As the Government points out, the defendant does not, by waiving his right to have an Article III judge conduct voir dire, waive his right to judicial review of those proceedings. [Citations omitted.] The nature of the right given up is therefore limited, particularly as compared to the other rights that we have held may be waived via counsel. In sum, there is no error here; the right to have an Article III judge conduct voir dire is one that may be waived through the consent of counsel.

Gonzalez, 483 F.3d at 393-94.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and resolve the division among several circuit courts concerning whether a federal criminal defendant must personally consent to a United States magistrate judge's presiding over jury selection or whether consent from the defendant's counsel by itself is sufficient to satisfy Article III's requirements.

For the reasons discussed below, petitioner's case presents an excellent vehicle for this Court to decide an important, recurring statutory and constitutional issue in federal criminal practice with wider implications for myriad federal cases, criminal and civil alike. The Fifth Circuit's decision in petitioner's case not only directly conflicts with decisions of at least one other United States Court of Appeals but also is in tension with decisions of this Court. Certiorari should be granted.

I. Threshold Issue: Does the Plain Error Standard Apply?

A threshold issue in this case, which also has divided the circuit courts, is whether the plain error standard of Federal Rule of Criminal Procedure 52(b) applies. Petitioner did not object to the magistrate judge's presiding over jury selection in the district court. The Fifth Circuit concluded that, because petitioner for the first time on appeal raised the issue of whether his personal consent was required for a valid delegation of jury selection to the magistrate judge, the claim was subject to the plain error standard. See Gonzalez, 483 F.3d at 394. According to the Fifth Circuit, "[t]his appears to be the practice in the other circuits that have considered this type of claim." Id. (citing

decisions of the First, Seventh, and Eleventh Circuits). Although the cited decisions of the First and Seventh Circuit so hold,[3] the Eleventh Circuit decision cited by the Fifth Circuit in fact explicitly held that the plain error standard is *not* applicable to this type of claim raised for the first time on appeal. See United States v. Maragh, 189 F.3d 1315, 1316-17 (11th Cir. 1999) (supplemental opinion on rehearing).[4] In support of its position, the Eleventh Circuit cited with approval both this Court's majority opinion (which never invoked the plain error standard notwithstanding a lack of objection in the district court in that case) and Justice Scalia's dissenting opinion in Peretz v. United States, 501 U.S. 923 (1991). See Maragh, 189 F.3d at 1316-17.[5]

---

[3] See United States v. Jones, 938 F.2d 737, 744 (7th Cir. 1991); United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983).

[4] In both his reply brief and at oral argument in front of the Fifth Circuit, petitioner cited the Eleventh Circuit's opinion on rehearing in Maragh for the proposition that the plain error standard was inapplicable in petitioner's case. See C.A. Reply Brief for Appellant, at 4 n.2. He alternatively contended that he was entitled to relief even under the plain error standard. See id. at 4.

[5] As Justice Scalia stated:

> As a general matter, of course, a litigant must raise all issues and objections at trial. . . . For criminal proceedings in the federal courts, this principle is embodied in Federal Rule of Criminal Procedure 51, which requires "a party, at the time the ruling or order of the [trial] court is made or sought, [to] mak[e] known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor." Rule 51's command is not, however, absolute. . . . [P]etitioner plainly forfeited the right to advance his current challenges to the Magistrate's role. In certain narrow contexts, however,

appellate courts have discretion to overlook a trial forfeiture. The most important of these is described in Federal Rule of Criminal Procedure 52(b): In criminal cases, an appellate court may notice "errors or defects" not brought to the attention of the trial court if they are "plain" and "affec[t] substantial rights." See United States v. Young, 470 U.S. 1, 15, and n. 12, 105 S.Ct. 1038, 1046, and n. 12, 84 L.Ed.2d 1 (1985). . . .

Even when an error is not "plain," this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below. See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530, 535-536, 82 S.Ct. 1459, 1464-1465, 8 L.Ed.2d 671 (1962) (opinion of Harlan, J.); Grosso v. United States, 390 U.S. 62, 71-72, 88 S.Ct. 709, 715, 19 L.Ed.2d 906 (1968); Hormel v. Helvering, 312 U.S. 552, 556-560, 61 S.Ct. 719, 721-723, 85 L.Ed. 1037 (1941). In my view, that course is appropriate here. Petitioner's principal claims are that the Federal Magistrates Act does not allow a district court to assign felony voir dire to a magistrate even with the defendant's consent, and that in any event the consent here was ineffective because given orally by counsel and not in writing by the defendant. By definition, these claims can be advanced only by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would never know whether the Act authorizes them, with the defendant's consent, to refer felony voir dire to a magistrate, and, if so, what form the consent must take. Cf. 18 U.S.C. § 3401(b) (defendant's consent to magistrate in misdemeanor trial must be in writing).

Given the impediments to the proper assertion of these claims, I believe we are justified in reaching the statutory issue today to guide the district courts in the future performance of their duties. It is not that we must address the claims because all legal questions require judicial answers, cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 489, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982); Webster v. Doe, 486 U.S. 592, 612-613, 108 S.Ct. 2047, 2058-2059, 100 L.Ed.2d 632 (1988) (SCALIA, J., dissenting), but simply that the relevant rules and statutes governing forfeiture, as we have long construed them, recognize a limited discretion which it

Justice Scalia's dissenting opinion - which agreed with the majority's decision to reach the merits of the issue despite the lack of objection in the district court - contended that the plain error standard is inapplicable when a litigant's claim "can be advanced *only* by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would *never* know whether the [Federal Magistrates] Act authorizes them, with the defendant's consent, to refer felony voir dire to a magistrate and, if so, what form the consent must take." Peretz, 501 U.S. at 954-55 (Scalia, J., dissenting).

In petitioner's case, the very nature of his claim - *i.e.*, that a defendant must *personally* consent in a knowing and voluntary manner to delegation of jury selection to a magistrate judge and that defense counsel's consent is not by itself sufficient - presupposes no objection in the district court. For that reason, this Court should refuse to apply the plain error standard and exercise this Court's discretion to address the merits of petitioner's claim (which the Fifth Circuit did in the alternative, see Gonzalez, 483 F.3d at 394).

---

is eminently sensible to exercise here.

Peretz, 501 U.S. at 953-55 (Scalia, J., dissenting).

II. A Federal Criminal Defendant's *Personal* Consent to Delegation of Voir Dire to a Magistrate Judge Is Required Under Article III and 28 U.S.C. § 636(b)(3).

In 1991, in Peretz, this Court held that, *with a federal criminal defendant's consent*, a district court does not violate the defendant's constitutional right to an Article III judge or the Federal Magistrates Act, 28 U.S.C.§ 636,[6] then it delegated jury selection to a magistrate judge. Peretz, 501 U.S. at 933-36. Previously, in Gomez v. United States, 490 U.S. 858 (1989), this Court had interpreted § 636(b)(3) to require a defendant's consent to delegation of jury selection in a federal felony case to a magistrate judge; this Court interpreted the statute in this manner to avoid the serious constitutional question that would arise if a non-Article III judge were to preside over such a critical stage of trial without the defendant's consent. See id. at 864.

As the Fifth Circuit recognized in petitioner's case, since Peretz, the federal circuit courts have issued conflicting decisions about whether consent from a defendant to delegation of jury selection to a magistrate judge must be *personally* given by the defendant himself in order to be valid or, instead, whether defense counsel's consent by itself is sufficient (without an

---

[6] 28 U.S.C. § 636, the Federal Magistrates Act, governs the types of proceedings in federal civil and criminal cases over which a United States magistrate judge can preside. In addition to the many specific duties that the statute permits a district court to delegate to a magistrate judge (with jury selection in a federal felony criminal case *not* included among them), § 636(b)(3) provides that: "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. 28 U.S.C. § 636(b)(3).

indication in the record that the defendant explicitly agreed or at least knowingly and voluntarily acquiesced in counsel's consent). See Gonzalez, 483 F.3d at 393-94 (citing decisions of the First, Seventh, and Eleventh Circuits). As the Fifth Circuit noted, the Eleventh Circuit has required "the defendant's personal consent,"[7] while the First Circuit has held that a lack of objection from the defendant constitutes a "waiver" of a defendant's right to have an Article III judge preside over jury selection.[8] The Seventh Circuit has held that it is not "plain error" for a magistrate judge to preside over jury selection in a federal felony case when the defendant does not object and, thus, has not held that a defendant's personal consent is required even in the absence of a contemporaneous objection from a defendant or defense counsel.[9]

The Fifth Circuit held that a federal defendant's attorney is authorized to consent on behalf of a defendant (whether the

---

[7] See United States v. Maragh, 174 F.3d 1202 (11th Cir.), supplemental op. on reh'g, 189 F.3d 1315 (11th Cir. 1999); see also United States v. Woodard, 387 F.3d 1329, 1332 (11th Cir. 2004) (reaffirming Maragh).

[8] United States v. Desir, 273 F.3d 39, 44 (1st Cir. 2001). In a civil case, the Eighth Circuit issued a decision directly in conflict with the First Circuit's decision in Desir. See Harris v. Folk Construction Company, 138 F.3d 365, 368-71 (8th Cir. 1998) (rejecting appellee's "waiver" argument and stating that "we conclude that, absent clear and unambiguous consent of the affected parties, a district court may not delegate, pursuant to § 636(b)(3), [jury selection]" to a magistrate judge). Notably, both the First and Eighth Circuit cited this Court's decision in Peretz in support of their respective positions. See Desir, 273 F.3d at 44 (citing Peretz); Harris, 138 F.3d at 369-370 & n.8 (citing Peretz).

[9] United States v. Jones, 938 F.2d 737, 744 (7th Cir. 1991).

defendant is even aware of counsel's actions) and that the record need not reflect the defendant's "personal" consent. Gonzalez, 483 F.3d at 394.[10] The Fifth Circuit specifically declined to adopt the position of the Eleventh Circuit in Maragh. See id.

While not directly addressing the issue of whether counsel may waive a litigant's right to an Article III judge, the Sixth and Tenth Circuits have held that a litigant's waiver of that right must be "voluntary, knowing, and intelligent." Norris v. Schotten, 146 F.3d 314, 326 (6th Cir. 1998) (citing, e.g., Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); United States v. Dobey, 751 F.2d 1140, 1141-43 (10th Cir. 1985). Certainly, it would appear that, under this precedent, a represented litigant at least must be *aware* of his attorney's consent. The record in the instant case, as discussed above, does not reflect Mr. Gonzalez's knowledge of his attorney's consent.

Since the time that the Fifth Circuit issued its decision in petitioner's case, the Ninth Circuit, in a two-to-one decision, addressed a closely related question and held that a defendant's personal consent is not required for a magistrate judge to preside over closing arguments and that defense counsel's consent by itself is sufficient under Peretz and Gomez. See United States v. Gamba, ___ F.3d ___, 2007 WL 1063147 (9th Cir. Apr. 11, 2007), reh'g en

---

[10] Accord United States v. Muhammad, 165 F.3d 327, 331-33 (5th Cir. 1999) (holding that a civil litigant's attorney is authorized to consent to a magistrate judge to enter judgment in a civil case pursuant to 28 U.S.C. § 636(c), and that the civil defendant himself need not "personally" consent).

banc denied, No. 06-35021 (9th Cir. May 22, 2007); see also id. at *8 (Fisher, J., dissenting) (contending that a federal criminal defendant's personal consent is required) (citing the Eleventh Circuit's decision in Maragh).[11]

The Eleventh Circuit in Maragh and the dissenting judge in Gamba were correct. For that reason, the Fifth Circuit erred in affirming Mr. Gonzalez's conviction, as the record does not reflect Mr. Gonzalez's knowing and voluntary *personal* consent to have a non-Article III judge preside over jury selection. As Ninth Circuit Judge Fisher recently explained:

> . . . [L]ike the Eleventh Circuit in Maragh, I read the Supreme Court as requiring some evidence that the defendant has personally and knowingly agreed to the substitution of a magistrate judge for an Article III judge [during a critical stage] - evidence that is lacking here.
>
> Peretz made clear that "the litigants' consent makes the crucial difference" when "construe[ing] the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates." Peretz, 501 U.S. at 933, 111 S.Ct. 2661. In doing so, the Court noted that the defendant's due process right to have an Article III judge preside over the critical stages of his felony trial is an underlying concern when interpreting the "additional duties"

---

[11] The Ninth Circuit's decision in Gamba appears to conflict with the Ninth Circuit's earlier decisions in United States v. Gomez-Lepe, 207 F.3d 623, 631 (9th Cir. 2000) ("[W]e hold . . . that the magistrate judge should not have proceeded without the defendant's affirmative consent. . . . Nothing in the record indicates, nor does the government maintain, that Gomez-Lepe consented to the magistrate judge's actions. . . . [B]ecause Gomez-Lepe did not affirmatively consent, we conclude that the magistrate judge exceeded his authority."), and United States v. Foster, 57 F.3d 727, 731 & n.1 (9th Cir. 1995) (citing NLRB v. A-Plus Roofing, 39 F.3d 1410 (9th Cir. 1994), reh'g en banc on other grounds, 133 F.3d 704 (9th Cir. 1998), vacated on other grounds, 525 U.S. 801 (1998), on remand, 165 F.3d 689 (9th Cir. 1999).

provision of the [Federal Magistrates Act]. See id. at 932-33, 111 S.Ct. 2661. Congress specifically limited assignments to "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3) In interpreting the FMA, therefore, it is "settled policy to avoid an interpretation . . . that engenders constitutional issues." Peretz, 501 U.S. at 929, 111 S.Ct. 2661 (quoting Gomez, 490 U.S. at 864, 109 S.Ct. 2237). This framework controls our assessment of whether the "crucial" element of defendant's consent to the magistrate judge's jurisdiction has been established.

Whatever ambiguity may exist in Peretz, the Supreme Court has never endorsed the legitimizing force of consent to a magistrate judge's jurisdiction on a record so devoid of any indication that the defendant himself understood and knowingly waived his right to have a "person with jurisdiction to preside" over all critical stages of his felony trial. Gomez, 490 U.S. at 876, 109 S.Ct. 2237. In Peretz, the Court noted that "*both* petitioner and his counsel" attended the pre-trial conference at which the counsel consented to the magistrate judge's jurisdiction and that the magistrate judge thereafter specifically asked counsel whether she had the "*clients'* consent to proceed with the jury selection." 501 U.S. at 925, 111 S.Ct. 2661 (emphasis added). The Court did not specify whether the petitioner's presence and failure to object were necessary components of his consent, but the Eleventh Circuit has understood them as such. See Maragh, 174 F.3d at 1206. Maragh noted that "[i]n Peretz, the specific consent that the Supreme Court approved consisted of (a) trial counsel's agreement to the procedure, (b) trial counsel's representation that the client was aware of and agreed to the procedure, and (c) the lack of any objection from the defendant in the district court." Id. Maragh is buttressed by Peretz's suggestion that the defendant, not just his attorney, must agree to a magistrate judge: "'If a *criminal defendant, together with his attorney,* believes that the presence of a judge best serves his interests during the selection of the jury, then Gomez preserves his right to object to the use of a magistrate.'" Peretz, 501 U.S. at 935, 111 S.Ct. 2661 (quoting Government of the Virgin Islands v. Williams, 892 F.2d 305, 311 (3d Cir.1989)) (emphasis added). Here, neither the district judge nor magistrate judge asked for or received consent in the presence of the defendant. . . .

Gamba, 2007 WL 1063147, at *8-*10 (Fisher, J., dissenting) (emphasis in original).

Besides the foregoing language in Peretz and Gomez cited by Judge Fisher, this Court's decision in Commodities Future Trading Comm'n v. Schor, 478 U.S. 833 (1986), strongly suggests a litigant's consent to have a non-Article III judge preside over a critical stage of his trial must be "personal." In Schor, this Court described the constitutional right to an Article III judge as "a personal right." Id. at 848. How, one may fairly ask, can a litigant's attorney waive a litigant's "personal" constitutional right when the litigant is not even aware of the attorney's waiver?

Although this Court has stated that a criminal defendant need not "personally make an informed waiver" of most rights related to the conduct of a trial (*e.g.*, evidentiary objections) and that an attorney may waive such rights without the defendant's knowledge or participation in the waiver, New York v. Hill, 528 U.S. 110, 114-15 (2000), "[f]or certain fundamental rights, the defendant must ***personally*** make an informed waiver." Id. at 114 (emphasis added)(citing, e.g., Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938) (right to counsel); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (right to plead not guilty)). One of those fundamental rights is the right to a jury trial. Patton v. United States, 281 U.S. 276, 312 (1930), overruled on other grounds, Williams v. Florida, 399 U.S. 78, 90 (1970). The waiver of such a fundamental right must constitute "the express and intelligent consent of the defendant [to proceed without a jury]." Patton, 281 U.S. at 312;

accord United States v. Frechette, 456 U.S. 1, 9 (1st Cir. 2006). Similarly, there must be "express and intelligent consent" from a criminal defendant himself for a non-Article III judge to preside over a critical stage of trial.

Notably, in discussing the waiver of the constitutional right to an Article III judge, this Court has spoken of the right in a manner that equates it to the most "fundamental" rights of a criminal defendant. See Schor, 478 U.S. at 848 ("Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which . . . criminal matters must be tried. See, e.g., Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (waiver of criminal trial by guilty plea); Duncan v. Louisiana, 391 U.S. 145, 158, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968) (waiver of right to trial by jury in criminal case).").[12]

In conclusion, "[g]iven the unsettled state of the [case] law interpreting Peretz," Gonzalez, 483 F.3d at 394, this Court should grant certiorari and address this important issue. The specific issue raised by petitioner's case (which concerns a federal criminal defendant's consent to a magistrate judge's presiding over jury selection) has broader implications for all federal criminal cases, civil and criminal alike, insofar as 28 U.S.C. § 636(b)(3)

---

[12] See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (describing Article III's creation of an independent judiciary as a "fundamental principle").

applies to many potential contexts. See, e.g., Gamba, 2007 WL 1063147 (addressing the consent issue in the context of a magistrate judge's presiding over closing arguments in a federal criminal case); Harris, 138 F.3d at 371 (addressing the consent issue in the context of a magistrate's presiding over jury selection in a federal civil case). For all these reasons, certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner, Homero Gonzalez, prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date:
May 24, 2007

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

By_____
BRENT E. NEWTON
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana, Suite 310
Houston, TX 77002-1634
Telephone: (713) 718-4600